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1 DOWNEY BRAND LLP
2 R. DALE GINTER (Bar No. 100784)
3 MARY OLDEN (Bar No. 109373)
4 621 Capitol Mall, 18th Floor
5 Sacramento, CA 95814-4731
Telephone: (916) 444-1000
Facsimile: (916) 444-2100
dginter@downeybrand.com
molden@downeybrand.com

6 Attorneys for Debtor
7 Big Black Dogs, LLC

8 **UNITED STATES BANKRUPTCY COURT**
9 **EASTERN DISTRICT OF CALIFORNIA**

10
11 In re:
12 Big Black Dogs, LLC,
13 Debtor.

14 Case No. 10-49712
Docket Control No. DB-1
**DEBTOR'S MOTION FOR
AUTHORITY TO USE CASH
COLLATERAL**

15
16 Date: November 15, 2010
17 Time: 10:30 a.m.
Dept.: Ctrm D
18 Place: US Bankruptcy Court
501 I Street, 6th Floor
19 Judge: Sacramento, CA 95814
The Honorable Robert S.
Bardwil

20
21 **I. INTRODUCTION AND JURISDICTION**

22 Big Black Dogs, LLC, a California limited liability company, ("BBD" or "Debtor")
23 filed its Chapter 11 Petition on November 10, 2010.

24 This Court has jurisdiction over this cash collateral motion pursuant to 28 U.S.C. §§
25 1334 and 157 and 11 U.S.C. § 363. This matter is a core proceeding.

26
27 **II. RELIEF REQUESTED.**

28 BBD owns 3 parcels of real estate in Yuba City, Sutter County, California. (See
Declaration of Grover Scott Black ("Black Decl.") filed herewith, at ¶ 2). These 3 parcels

1 include the Palisade Plaza, a small shopping center (“Plaza”), the Palisade Hotel, an 83 room
2 hotel (“Hotel”) and vacant parcel across the street from the Hotel of about a 1/2 acre (“Vacant
3 Parcel”). (See Black Decl., at ¶ 2.)

4 The Plaza is a 12 unit retail shopping center immediately adjacent to the Hotel
5 consisting of 15,954 square feet of rentable space, of which, 14,627 square feet is presently
6 occupied. The Plaza currently generates \$27,030.00 in monthly rents and no tenant is
7 presently past due. (See Black Decl., at ¶ 3.) The Hotel is a two story, 83 room hotel with
8 room rental rates ranging from \$45 to \$60 a night. Among its many amenities, the Hotel
9 offers a conference room, a laundry facility, and vending machines. In addition, the Hotel is
10 in close proximity to numerous restaurants, bars and lounges, and is conveniently located one
11 block from California State Route 99. (See Black Decl., at ¶ 4.)

12 Umpqua Bank (“Bank”) made two loans to BBD’s predecessor in interest, one on the
13 Plaza and the other on the Hotel and Vacant Parcel. (See Black Decl., at ¶ 5.)

14 The rents at the Plaza are sufficient to service the Bank’s loan encumbering it (the
15 loans are cross-defaulted, but not cross-collateralized). (See Black Decl., at ¶ 8.) However,
16 due to problems not of BBD’s making, the Hotel’s revenues have not been sufficient to
17 service that Bank’s loan on the Hotel. Before debt service, the Hotel is currently operating
18 with an approximate negative cash flow of \$3,000.00. The Hotel’s negative cash flow,
19 however, is offset by the Plaza’s positive cash flow. The total revenues are sufficient to meet
20 operating expenses and provide the Bank with adequate protection while the BBD reorganizes
21 under this Chapter 11. (See Black Decl., at ¶ 8.)

22 Therefore, BBD requests this Court to authorize the use of the Bank’s cash collateral
23 pursuant to Bankruptcy Code § 363 and Federal Rule of Bankruptcy Procedure (“Bankruptcy
24 Rules), Rule 4001(b).

25 **III. THE BANK’S LOANS, BLACK’S LOANS AND BBD’S OWNERSHIP.**

26 On December 17, 2002, Jacobus Justin Bor (“Bor”), borrowed \$2,735,149.00 from
27 Feather River State Bank (ultimately acquired by the Bank) to purchase the Hotel (the “Hotel
28

1 Loan")¹. The Hotel is located at 965 Gray Avenue, Yuba City, California 95991. The Hotel
2 Loan was secured by a first deed of trust. (See Black Decl., at ¶ 9.)

3 Five years later, on May 25, 2007, Bor obtained a second loan from the Bank in the
4 amount of \$2,747,815.00 to enable him to purchase the Plaza, a small shopping center located
5 adjacent to the Hotel (the "Plaza Loan"). The Plaza Loan was secured by a deed of trust (the
6 Plaza and Hotel are collectively referred to hereinafter as the "Properties"). (See Black Decl.,
7 at ¶ 10.)

8 Apparently, business did not go well for Bor because he needed to borrow money by
9 early 2009. Bor borrowed \$1,750,000 from, Grover Scott Black (hereinafter "Black") on
10 April 1, 2009 (the "Black Loan"). The Black Loan was secured by a second priority deed of
11 trust behind the Bank on the Properties. A mere five months after the Black loan was made,
12 Bor defaulted. Black subsequently began foreclosure proceedings against the Properties
13 which ultimately resulted in Bor granting the Properties via a deed in lieu of foreclosure to
14 Black's limited liability company named Big Black Dogs, LLC ("BBD").² BBD acquired
15 the Properties on March 8, 2010. (See Black Decl., at ¶ 11.)

16 When BBD became the Properties' owner, the Hotel was carrying \$180,000 in trade
17 debt and approximately twenty of the Hotel's eighty-three rooms had been closed due to
18 extensive water damage. As a result, BBD was forced to invest about \$28,500 to bring these
19 rooms back into service, and, in the process, enhance the Bank's collateral. In addition,
20 Black, through BBD, invested another \$33,015 to keep the vendors supplying the Hotel. (See
21 Black Decl., at ¶ 12.)

22 Meanwhile, and not surprisingly, the debt service owing to the Bank was too much for
23 BBD's cash flow to handle. BBD, through Black, reached out to the Bank to garner some
24 patience and understanding, in the form of a forbearance and interest rate reduction, to
25 provide BBD with time to improve the Hotel's cash flow. Over the next five to six months,
26 Black made multiple proposals to the Bank to modify the terms of the Hotel and Plaza Loans,

27 ¹ Feather River State Bank was subsequently purchased by Umpqua Bank which currently holds the Hotel Loan.

28 ² BBD was named for Black's two "big" black dogs – a Chihuahua and miniature poodle.

1 including extensions, potential buyouts, interest only payments and various proposals to pay a
2 reduced amount of interest and principal. Throughout these negotiations, BBD continued to
3 make debt service payments on the Plaza until August 6, 2010, while struggling to remain
4 current with the Hotel's operating expenses. During the negotiations, BBD even made two
5 payments on the Hotel Loan and offered to make interest only payments. The Bank refused
6 this offer as well. (See Black Decl., at ¶ 13.) Currently, the amounts owing on the Hotel
7 Loan and Plaza Loan are approximately \$2,176,528 and \$2,698,850, respectively. Black
8 believes, however, that the Hotel is worth \$1,500,000, while the Plaza is worth \$2,200,000.
9 (See Black Decl., at ¶¶ 6,7.)

10 Despite the Bank's expression of willingness to negotiate with BBD the Bank's sole
11 response to BBD's multiple proposals was the Bank's demand for BBD to grant the Hotel to
12 the Bank in exchange for a mere promise to "work something out" on the Plaza Loan.
13 Without being able to reach an acceptable agreement with the Bank, BBD was forced to file
14 its Chapter 11 bankruptcy petition on November 10, 2010 (the "Petition Date").

15 **IV. ARGUMENT AND AUTHORITIES**

16 BBD is a creditor which acquired the Subject Properties as a result of Bor's default.
17 BBD was not a party to the Loan Documents. BBD has obtained some but not all the loan
18 documents³ and is thus unable to completely analyze the Bank's rights under its loan
19 documents. For purposes of this motion only, BBD assumes without admitting that the Bank
20 has perfected its security interests in rent. BBD believes that the Plaza Loan and Hotel Loan
21 are cross-defaulted but not cross-collateralized.

22 BBD seeks this Court's authority to use the Bank's putative cash collateral while
23 reorganizing. There are two legal basis that permit BBD's use of cash collateral. First, under
24 California Law the Bank's security interest in the rents is limited to amounts not necessary for
25 maintenance and operation of the Properties. Secondly, the Bank's interests are adequately
26 protected and authority should also be granted under Bankruptcy Code §363.

27

28 ³ BBD understands that the Bank is protective of its borrower's privacy, and does not imply any wrongdoing on
the Bank's or Bor's part.

1 A. CALIFORNIA LAW GOVERNS THE BANK'S INTEREST IN THE
2 PAYMENTS.

3 State law governs interests in property unless specifically overridden by a provision of
4 the Bankruptcy Code. *Butner v. United States*, 440 U.S. 48, 99 S.Ct. 914, 59 L.Ed.2d 136
5 (1979). Courts have consistently followed *Butner*, applying state law in analyzing a secured
6 lender's rights in rents and similar payments.

7 Determining whether federal or state law governs a dispute
8 between a bankruptcy trustee and a mortgagee over the right to
9 the rents collected between the mortgagor's bankruptcy and the
10 foreclosure sale, the Supreme Court unanimously held that state
11 law was determinative. *Butner v. United States*, 440 U.S. 48,
12 99 S.Ct. 914, 59 L.Ed.2d 136 (1979). The court emphasized the
13 desirability of having "the basic federal rule" be "that state law
14 governs." *Id.* at 57, 99 S.Ct. at 919. Although the precise
15 question at issue here is not the same as in *Butner*, we see no
16 federal reason requiring a different result and "no reason why
17 such interests should be analyzed differently simply because an
18 interested party is involved in a bankruptcy proceeding." *Id.* at
19 55, 99 S.Ct. at 918.

20 *Financial Security Assurance, Inc. v. Days California Riverside Limited Partnership*,
21 27 F.3d 374, (9th Cir. 1994).

22 B. CALIFORNIA LAW REQUIRES THE APPLICATION OF RENTS, ISSUES
23 AND PROFITS TO THE PROTECTION OF THE REAL PROPERTY.

24 California Civil Code ("CC") § 2938 provides for the assignment of interests in rents,
25 issues and profits of real property, and perfection and enforcement of assignment rights.
26 Those assignment rights, however, are subject to an obligation to expend the rents, issues and
27 profits to preserve and protect the real property:

28 (g)(1) If the assignee enforces the assignment under
29 subdivision (c) by means other than the appointment of a
30 receiver and receives rents, issues, or profits pursuant to this
31 enforcement, the assignor or another assignee of the affected
32 real property may make written demand upon the assignee to
33 pay the reasonable costs of protecting and preserving the
34 property, including payment of taxes and insurance and
35 compliance with building and housing codes, if any.

36 BBD hereby makes demand on the Bank to permit the use of the rents, issues and
37 profits of the Properties for the purposes which CC § 2938(g)(3) requires. In effect, CC §

1 2938(g)(3) is a limitation on a secured lender's rights to the rents, issues and profits that
2 comprise its collateral.

3 C. THE BANK'S SECURITY INTEREST IS ADEQUATELY PROTECTED.

4 Bankruptcy Code § 363(c) and (e) permit this Court to authorize the use of cash
5 collateral upon a finding the Bank's security interest is adequately protected.

6 BBD believes the present value of the Hotel to be about \$1,500,000. Because of the
7 senior lien of the past due property taxes, the Bank's secured claim amount with regard to the
8 Hotel is approximately \$1,428,000. As to Plaza, BBD believes its value to be about
9 \$2,200,000, which after deducting past due property taxes, leaves the Bank with a secured
10 claim of around \$2,138,000. It's axiomatic that the only amount entitled to adequate
11 protection is the amount of the Bank's secured claim. *United Savings Assn of Texas v.*

12 *Timbers of Inwood Forest Associates, Ltd.*, 484 U.S. 365 (1988)

13 Attached as Exhibit A is BBD's cash flow projection and cash collateral budget for
14 November and December 2010 and January 2011 ("Budget"). See Declaration of Black
15 ("Black Decl.") and the Declaration of Richard Gerdts, CPA ("Gerdts Decl."). The Budget is
16 divided into 3 columns, the first column is budget for the combined Properties, the second
17 column is for the Hotel and the third column is for the Plaza. Not including the Bank's debt
18 service, the Plaza generates a positive monthly cash flow of about \$23,000, while the Hotel is
19 operating at about a negative (\$1,500) per month cash flow. See Gerdts and Black Decls.

20 The Budget was reviewed and prepared by BBD's accountant Richard Gerdts
21 ("Gerdts"), CPA, 4910 Campus Drive, Newport Beach, CA. 92660 . In order to prepare the
22 Budget, Black provided Gerdts with the applicable documents, including the rent rolls for the
23 Plaza and other financial information and management assumptions. The Budget for the
24 Plaza is based upon the rent roll and the actual rents received, and actual expenses incurred,
25 during the past few months. Black carefully reviewed the Budget and believes that it
26 accurately sets forth his management assumptions and projections and that the Plaza's income
27 and expenses are stable. (See Black Decl. at ¶ 16.)

28 The Hotel's revenue and expenses are naturally more volatile than the leased up,

1 stabilized Plaza's. The Hotel's expenses are relatively stable and are based upon the actual
2 expenses from recent months. The budgeted revenues for the Hotel are conservative, based
3 upon recent months and the trend line of revenues, while factoring in seasonality. Mr. Black
4 believes the Hotel will achieve, and probably exceed, the Budget. (See Black Decl. at ¶ 17.)

5 The Budget provides for payment of all ongoing operating expenses and the real
6 property tax installment due on December 10, 2010. All of the operating expenses proposed
7 to be paid (called "Operating Out-Flows" in the Budget) are actual and necessary expenses of
8 operating and preserving the properties and accordingly fit within the types of expenditures
9 which the Bank would be required to pay were it collecting the rents. See Cal. CC §
10 2938(g)(1) (See Black Decl. at ¶ 17.)

11 As briefed, the Bank's security interest in bankruptcy is no greater than under state
12 law. Therefore, since California law requires this "carve out" from the Bank's security
13 interest the Court should find that to the extent the rents and profits are used to pay the
14 budgeted expenses that such rents and profits are, in effect, not the Bank's collateral.

15 Alternatively, the Budget demonstrates that Bank's collateral is being protected and
16 preserved and authorize BBD to use the Debtor's cash collateral.

17 **V. TERMS OF AUTHORIZATION REQUESTED**

18 1. BBD requests the use of the Bank's cash collateral as provided for in the
19 Budget.

20 2. BBD requests that the Bank be provided with a replacement lien in post-
21 petition rents and revenues from the Hotel and Plaza.

22 3. BBD will pay the Bank an adequate protection payment of \$7,000.00 per
23 month commencing December 1, 2010.

24 4. BBD requests the interim use of cash collateral until a final hearing can be held
25 in early December, 2010.

26 **VI. CONCLUSION**

27 The Bank's security interest is adequately protected. Continued operation of the Hotel
28 and Plaza is the only sensible course of conduct. California law recognizes that rents and

1 profits must be used to maintain the property (Cal. CC § 2938) and have so limited a secured
2 creditor's rights. Under the Bankruptcy Code the use of cash collateral can be authorized
3 when the secured creditor's rights are adequately protected. Using the Bank's cash collateral
4 to operate while BBD reorganizes will provide adequate protection to the Bank.

5

6 DATED: November 10, 2010

DOWNEY BRAND LLP

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8 By: 

9 R. DALE GINTER
10 Attorney for Debtor
11 Big Black Dogs, LLC

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Big Black Dogs, LLC
Cash Collateral Forecast

	Combined			Palisade Hotel			Palisade Plaza		
	Nov 10	Dec 10	Jan 11	Nov 10	Dec 10	Jan 11	Nov 10	Dec 10	Jan 11
Beginning Cash	5,999	26,899	19,482	4,754	2,455	(14,710)	1,246	24,444	34,192
Cash In-Flows									
Cash Received from Hotel Rates / Rents	62,030	62,030	62,030	35,000	35,000	35,000	27,030	27,030	27,030
Total Cash In-Flow	62,030	62,030	62,030	35,000	35,000	35,000	27,030	27,030	27,030
Cash Out-Flows									
Cost Out-Flows									
Operating Out-Flows									
Advertising and Promotion	388	388	388	388	388	388	368	368	368
Auto Expenses	222	222	222	222	222	222	120	120	120
Cable TV	799	799	799	799	799	799			
Card Reader Service	90	90	90	90	90	90			
Computer and Internet Expenses	164	164	164	164	164	164			
Credit Card Expenses	565	565	565	565	565	565			
Elevator Expense	336	336	336	336	336	336			
Equipment Lease	70	70	70	70	70	70			
Insurance Expense/Workers Comp	1,523	1,523	1,523	1,155	1,155	1,155	368	368	368
Landscaping and Groundskeeping	320	320	320	200	200	200			
Licenses & Permits	868	-	-	868	-	-			
Linen and Laundry	842	842	842	842	842	842			
Office Supplies	1,100	1,100	1,100	1,050	1,050	1,050	50	60	50
Outside Services - Maintenance	1,287	1,287	1,287	1,100	1,100	1,100	167	187	187
Payroll Fee	244	244	244	244	244	244			
Payroll Net Expense	12,000	12,000	12,000	12,000	12,000	12,000			
Payroll Taxes	3,000	3,000	3,000	3,000	3,000	3,000			
Pest Control	138	138	138	78	78	78	60	60	60
Miscellaneous	130	130	130	130	130	130			
Professional Fees	125	125	125	125	125	125			
Repairs and Maintenance	3,640	3,640	3,640	2,360	2,360	2,360	1,280	1,280	1,280
Reservations Service	300	300	300	300	300	300			
Security	500	500	500	320	320	320	180	180	180
Swimming Pool Service & Supplies	375	375	375	375	375	375			
Telephone Expense	833	833	833	760	760	760	73	73	73
Transient Occupancy Tax - Current	3,500	3,500	3,500	3,500	3,500	3,500			
Utilities	7,346	7,346	7,346	5,832	5,832	5,832	1,514	1,514	1,514
Vending Expense	426	426	426	426	426	426			
Total Operating Out-Flows	41,130	40,262	40,262	37,299	36,431	36,431	3,832	3,832	3,832
Subtotal Operating Cash Flow	20,900	21,768	21,768	(2,299)	(1,431)	(1,431)	23,199	23,199	23,199
Other Cost Out-Flows									
Property Taxes - Current	-	28,316	-	14,856			13,450		
Property Taxes - Land	-	868	-	868					
Total Other Cost Out-Flows	-	29,184	-	15,734	-	-	13,450	-	-
Total Cost Out-Flows	41,130	69,446	40,262	37,299	52,165	36,431	3,832	17,262	3,832
Net Cash In/(Out) Flow	20,900	(7,416)	21,768	(2,299)	(17,168)	(1,431)	23,199	9,749	23,199
Ending Cash	26,899	19,482	41,250	2,455	(14,710)	(16,140)	24,444	34,192	57,391

EXHIBIT A